Supreme Court, U.S.
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No. 02-1474

IN THE

Supreme Court of the United States

ALABAMA POWER COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF

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ARGUMENT IN REPLY

Respondents argue that the Government can take property and pay nothing for that property. It cannot.

Respondents principally rely on two flawed arguments. First, they argue that just compensation should be determined by a "loss to the owner" standard that excludes fair market value. This argument ignores the precedent of this Court providing that the loss to the owner is measured by fair market value or, in the absence of readily available market data, a reasonable proxy. Marginal cost is neither a recognized nor a reasonable proxy for fair market value. Second, Respondents rely on two cases in which the fair value of the property at issue was held to be nominal where no other marketable uses for the property existed. In this case, however, the Record, as well as Congress's provision of a higher rate for telecommunications providers, demonstrates that numerous marketable uses for utility pole space do in fact exist. Such uses constitute "lost opportunities" ignored by the Respondents' arguments and the court of appeals' unprecedented analysis.

The amount of just compensation due for taking utility pole space is an issue of national importance that should be settled by this Court.

I. THE "LOSS TO THE OWNER" MEASURE OF JUST COMPENSATION IS SYNONYMOUS WITH FAIR MARKET VALUE OR A RECOGNIZED PROXY.

A. Respondents Distort The "Loss To The Owner" Standard.

Throughout their Briefs in Opposition, Respondents imply that the "loss to the owner" measure of just compensation somehow yields a result different in this case from fair market value or a recognized proxy. *E.g.*, Int. 14 ("But 'market

value' does not apply in circumstances where there is no 'market.' Instead, the general, governing standard for determining just compensation is 'loss to the owner.'"). This argument suffers from several fundamental flaws. First, this Court has defined "just compensation" as "the full monetary equivalent of the property taken." *United States v. Reynolds*, 397 U.S. 14, 16 (1970). The "full monetary equivalent" is determined by the fair market value at the time of the taking. *Palazzolo v. Rhode Island*, 533 U.S. 606, 625 (2001). If the full monetary equivalent cannot be determined by reference to a readily available market price, this Court utilizes proxies for fair market value. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979). The point here, which appears to be lost on Respondents, is that the proxy yields (in theory, at least) a result consistent with fair market value, had such a readily available market price existed. In takings cases, fair market value is always the target.

Second, fair market value in the just compensation context is determined only by the best available information. There is no actual negotiated sale of the specific piece of property at issue. Instead, just compensation is measured by what a hypothetical willing buyer would pay a hypothetical willing seller. *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973). If the property at issue were publicly traded stock, the best available information would be the listed exchange price (NYSE, NASDAQ, etc.). If the property at issue were privately traded real estate, the best available information would be comparable sales. *See United States v. 50 Acres of Land*, 469 U.S. 24, 30 (1984). If no comparable sales are available, the "loss to the owner" is measured by a fair market value proxy, such as income capitalization, replacement cost, etc. *Cf. 564.54 Acres of Land*, 441 U.S. at 515; *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949). Even Respondents recognize this. *E.g.*, Int. 14-15. Fair market value (and any proxy for fair market value) is nothing more than a best-available-data

approximation of the "loss to the owner." To suggest a conceptual incongruity between fair market value and "loss to the owner" is to reject this Court's requirement for the payment of "the full monetary equivalent of the property taken."

The Government notes "[o]ther measures of 'just compensation' are employed" if market value is too difficult to determine. Resp. 19 (quoting *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 n.14 (1984)). Respondents, however, reject these "other measures" and advocate a methodology that provides *no measure* of the value of the property taken. Simply paying utilities the marginal costs they incur in getting a pole ready to support a cable attachment does not compensate the owner for the value of the actual pole space taken. Marginal cost plus nothing is not a recognized constitutional measure of just compensation.

B. Alabama Power Company's Loss Can Be Measured By Its Lost Opportunity To Lease The Same Property At A Higher Price.

"[B]ecause the Pole Attachments Act [of 1978, as amended by the Telecommunications Act of 1996,] effects a physical taking, pole owners are entitled to market value for granting access to their poles, and such value properly includes opportunity cost . . . ." Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 Cornell L. Rev. 885, 1001 (2003). Alabama Power Company's opportunity cost is not merely theoretical, as the court of appeals held and Respondents argue. *E.g.*, Pet. App. 19a. ("[I]t would not make sense for the power companies to say, 'Even though we are not out any more money than we were before the taking, we are missing out on the opportunity to sell to the government at what we deem the full market price of this pole space.'"); Int. 23 ("Petitioner's claimed right to sell pole space at 'an unregulated rate to a non-cable or non-telecom business' was never made, let alone

proven, in the record below"). Instead, Alabama Power Company (APCo) presented unrebutted record evidence that some attachers are willingly paying APCo's just compensation price of $38.31 (based on replacement cost) for identical space. APCo's Answer to Petition for Stay, Ex. 1, ¶ 14.[1] APCo also presented unrebutted evidence that it receives annual rentals between $25 and $40 for similar attachments under its unregulated joint use agreements with telephone companies (*id.* at ¶ 13),[2] that non-communications companies are paying up to $40 per pole annually for this same pole space (APCo's Notice of Filing Supplemental Authority, pp. 5-6), and that its poles are crowded (Pet. 24-25). Moreover, Congress itself has recognized the existence of other attachers (*i.e.*, telecommunication companies) and the availability of a higher rate (Telecom Rate) in the same statute under which Respondents seek refuge. *Cf. Nemmers v. City of Dubuque*, 764 F.2d 502, 504 (8th Cir. 1985) ("In determining market value, we have approved the use of evidence of comparable sales as the 'best evidence' of [just compensation] damages.").

With respect to the Telecom Rate, which is substantially higher than the Cable Rate, Respondents contend that (1) "the rate for telecommunications attachments has no constitutional significance," and (2) "Congress's determination that other pole attachers should pay a higher rate is indeed irrelevant." Int. 22; Resp. 18. These conclusory assertions do nothing to alter the fact that, at a minimum, Congress recognized a more

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[1] Since the proceeding before the FCC, attachers have voluntarily continued to pay just compensation prices to APCo and other utilities. *See, e.g.* Gulf Power Company's Petition for Reconsideration and Request for Evidentiary Hearing, p. 12, *Florida Cable Telecomms. Ass'n v. Gulf Power Co.*, FCC, P.A. No. 00-004 (pending proceeding).

[2] Because part of the consideration in joint use agreements involves reciprocal privileges, the actual rental charge is deflated. APCo's Response to Complaint, Ex. B, p. 26.

"full monetary equivalent" for the exact same space. Only the Government attempts to offer an explanation for the disparity: "The [Just Compensation] Clause sets a minimum, not a maximum, amount that the government must pay when it effects a taking of a property right." Resp. 18. There are at least three analytical errors with this explanation. First, the very notion of a "range" of compensation smacks of rate regulation. Even the court of appeals acknowledged, "[w]hen a physical taking is at issue, however, a different analytical hat must be worn." Pet. App. 15a. Second, it is anathema to the principles of just compensation that *identical* property on the *exact* same pole could yield prices of $6.30 and $20.41, respectively. Third, even a so-called "minimum" amount of just compensation should not yield a "favorable" price for either the taker or the property owner. However, this is precisely what the Cable Rate yields. AT&T, one of the Intervenors, boasted to its stockholders after the enactment of the Telecommunications Act of 1996 (1996 Act) that the "favorable" Cable Rate remained intact. Congress itself acknowledged, "[t]he formula, developed in 1978, gives cable companies a more favorable rate for attachment than other telecommunications service providers. The beneficial rate to cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy." H. R. REP. NO. 104–204, at 91 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 58.

C. *Metropolitan Transportation* And *Loretto* On Remand Are Inapposite.

Respondents attempt to justify the court of appeals' marginal-cost-plus-nothing approach based on a legally and factually distinguishable Second Circuit case, *Metropolitan Transportation Authority v. ICC*, 792 F.2d 287 (2nd Cir. 1986), and baseless assumptions regarding state court treatment of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), on remand. Int. 19-21; Resp. 13-15. The Government claims that APCo was "incorrect" in

arguing that *Metropolitan Transportation* is inapposite because it "is not a takings case; it is a rate regulation case." Resp. 14 (quoting Pet. 15). While Respondents may dispute whether *Metropolitan Transportation* is inapposite, they cannot credibly dispute that it was, indeed, a rate regulation case. Respondents rely on a portion of the opinion that states, "assuming arguendo that there has been a taking, compensation is adequate . . . ." *Metropolitan Transp.*, 792 F.2d at 297. This statement is dicta — nothing more and nothing less. Nothing in *Metropolitan Transportation* (dicta or otherwise) comes close to a sound just compensation analysis.

Moreover, the use of the property at issue in *Metropolitan Transportation* is fundamentally different than the use of the property at issue in this case. As the court of appeals below noted of *Metropolitan Transportation*: "Allowing traffic from one railroad rarely means that another railroad is precluded from traveling on the same line unless, of course, the line is already crowded." Pet. App. 20a. This analysis (although erroneous in any takings case) is far less offensive for the sporadic use at issue in *Metropolitan Transportation* than in a case where, as here, once the property is taken, it is forever lost to the owner.[3] Further, the court of appeals in *Metropolitan Transportation*, 792 F.2d at 298, specifically noted: "The model of negotiation between a willing buyer and a willing seller is inappropriate to the instant case: Amtrak is the only passenger railroad that has or seeks to have access to Metro-North's lines . . . ." In this case, however, there are now many marketable uses for APCo's utility pole space, including the support of telephone, cable television, Internet, wireless communication, and other miscellaneous attachments. *See, e.g.*, APCo's Answer to Petition for Stay, Ex. 1 ¶¶ 13-14; APCo's Notice of Filing

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[3] The cable wires attached to APCo's poles are not passing trains.

Supplemental Authority, pp. 5-6. In addition, since *Metropolitan Transportation* was decided, the market has changed. Since 1986, several large railroads and the Metropolitan Atlanta Rapid Transit Authority have begun to allow cable and pole line companies to bury cable along their rights-of-way in exchange for fair market value rents. APCo's Response, Ex. 5, pp. 16-17 & 30.

Loretto on remand likewise misses the mark. The Government argues: "If a nominal sum was sufficient in *Loretto* to provide just compensation, the statutory formula for cable attachments in this case . . . must be adequate as well." Resp. 15. There are several problems with this argument. First, nowhere in *Loretto* on remand did the state court engage in a marginal cost analysis or otherwise endorse marginal cost as a fair market value proxy. Second, nothing in the opinion suggests that Jean Loretto proffered any evidence of alternative uses or market value for her property. Third, and perhaps most importantly, once *Loretto* was remanded to the State Commission on Cable Television for a determination of just compensation, Jean Loretto never "made application to the Cable Commission for reasonable (now referred to in the Commission regulations as 'just') compensation. Instead, plaintiff . . . filed the present motion to recover more than half a million dollars in attorneys' fees from the defendant and the intervenor." *Loretto v. Group W. Cable*, 522 N.Y.S.2d 543, 545 (N.Y. App. Div. 1987). Thus, for aught it appears, Jean Loretto never pursued the just compensation issue — only the foundational issue of whether or not a taking had occurred.

Much more on point than *Metropolitan Transportation* or *Loretto* on remand are the practices of both the Government and the cable companies in charging telecommunications carriers fair market value for access to their rights-of-way. *See, e.g.*, TeleCommunity Alliance, *Valuation of the Public Rights-of-Way Asset*, p. 1 n.1, *available at*

http://www.telecommunityalliance.org/images/valuation 2002.pdf (last visited July 16, 2003); 43 C.F.R. §§ 2803, 2883 (2003). Respondents cannot square their contention that *Metropolitan Transportation* justifies paying only marginal costs for APCo's rights-of-way with their own practices of collecting both marginal costs and fair market value rents for their rights-of-way. 43 C.F.R. §§ 2883.1-1 (providing for reimbursement of costs incurred by the Government in granting access); 2803.1-2 (providing for an annual "fair market rental value determined . . . applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices"); APCo's Response, Ex. B, pp. 8-17 & 29-30 (Comcast owns cellular commuications towers and typically charges market rates for attachments ranging from $18,000 - $21,600 annually); Pet. 20-23.

D. Alabama Power Company Does Not Seek A Monopoly Rent.

Respondents not only advocate a rent for actual space taken that is too low ($-0-), but also imply that APCo is seeking a rent that is too high — a monopoly rent. *E.g.*, Resp. 2, 8, & 21. This argument fails both analytically and factually. First, the fact that APCo seeks a price different from that set by the Government pursuant to the Cable Formula does not mean that APCo seeks a price wholly free from review. Indeed, APCo's fundamental argument has consistently been that the price for pole space taken should be set by the courts at fair market value (or a recognized proxy therefor), not at a monopoly price.[4] Second, APCo's charge

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[4] In any event, *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893), at a minimum, provides for judicial review of the just compensation owed to a property owner for any taking. APCo is no more entitled to a monopoly price than the cable companies are entitled to a "favorable" or "beneficial" rate. *See* p. 5, *supra*.

of $38.31 per pole is based on actual replacement cost, *i.e.*, the cost of wooden poles, labor, etc. The supply of these items is not subject to monopoly control.

II. THE PHYSICAL TAKING OF SPACE ON UTILITY POLES EFFECTED BY THE 1996 ACT RAISES ISSUES OF NATIONAL IMPORTANCE.

In *FCC v. Florida Power Corp.*, 480 U.S. 245, 251 n.6 (1987), this Court reserved the precise question presented for review in this Petition. Since then, this Court has resolved questions raised by the 1996 Act regarding the authority of the FCC to regulate emerging telecommunications competitors in a "crucial segment of the economy worth tens of billions of dollars" and regarding the Act's coverage of utility pole attachments by Internet and wireless service providers. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999); *National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002). Since APCo filed its Petition in this case, this Court has granted petitions for writs of certiorari in *FCC v. Missouri Municipal League*, 71 U.S.L.W. 3624, 3785, 3789, 3568, 3648, 3625 (U.S. June 23, 2003) (Nos. 02-1238, 02-1386, 02-1405), to determine whether the 1996 Act pre-empts state law prohibiting municipalities from entering the telecommunications market. The answers to whether certain attachments are covered by the 1996 Act and whether additional competitors can enter the telecommunications market raise, in turn, the question of what price is to be paid for making such attachments and for entering such market.

Because the 1996 Act effects a physical taking, the price to be paid must be measured under the Just Compensation Clause. This Petition raises important questions of federal law that have not been, but should be, settled by this Court. Respondents do not, and cannot, dispute the national

importance of these issues. These issues affect all property owners, not just electric utilities. The court of appeals' decision that tangible property on utility poles has $-0- value implicates millions of miles of utility poles and conflicts with this Court's long-standing decisions that the owner must be compensated for the "full monetary equivalent of the property taken." *See Reynolds*, 397 U.S. at 16; *United States v. Miller*, 317 U.S. 369, 373 (1943); *Monongahela*, 148 U.S. at 326.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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